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IN THE

Supreme Court of the United States

OCTOBER TERM 1929.

No. 7

THE ANN ARBOR RAILROAD COMPANY, et al.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION and THE CALIFORNIA GROWERS' & SHIPPERS' PROTECTIVE LEAGUE,
Appellees.

REPLY BRIEF FOR APPELLANTS ON REARGUMENT.

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Washington, October 19, 1929.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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At the argument of this case at the past term it was contended in support of the Commission's order that it was made in a "conventional rate case" and that the Commission had, on ample evidence, made "a finding of unreasonableness under section 1 of the Interstate

Commerce Act." This position has now been abandoned by Appellees and it is admitted that the order was based upon the Hoch-Smith Resolution, rather than upon the provisions of the Act. Being admittedly based upon the Resolution the validity of the order turns on the correctness of the Commission's interpretation and application of the Resolution. If the Resolution was misinterpreted or misapplied, the order is void, and it is wholly immaterial what conclusion the Commission *might* have reached upon the same evidence under some other conception of the law, or under a correct interpretation of the Resolution.

Although now admitting that the order was based upon the Resolution it is difficult to determine whether the Appellees contend that the Resolution did or did not change the pre-existing law and if it did change the law, in what respect it made such change. In their Brief on Reargument the Appellees say:

> "The Commission correctly construed the Resolution as requiring it to weigh all the factors normally entering into the determination of the reasonableness of any rate and to fix rates on agricultural products suffering from depression as near the lower limit of the zone of reasonableness as would be compatible with the maintenance of an adequate transportation service." (p. 17)
>
> "The substance of the provision of the Resolution is that agricultural products affected by depression shall in this respect be included in the class of most favored commodities. . . ." (p. 22)
>
> "The Resolution itself, by the use of the words 'lowest possible lawful rates,' recognizes that there may be more than one lawful rate." (p. 24)
>
> "The Resolution, indeed, sets no new standard of lawfulness, * * *(p. 26):

"The amendment in question (involved in the Passenger Scrip Case, 263 U. S. 603) did not, as does the Hoch-Smith Resolution, add anything to the pre-existing law with respect to the determination of a reasonable rate" (p. 35).

"We submit that the Commission properly construed the third paragraph of the Resolution as entering into the prescribed legislative standard for the determination of the unreasonableness of rates on agricultural products suffering from depression and as meaning that a rate above the lowest possible lawful rate compatible with the maintenance of adequate transportation facilities must be deemed an unreasonable rate with respect to such commodities." (p. 36)

"The Commission did indeed give consideration to the economic condition of the industry. . . This discussion would have been germane in any proceeding, and apart from the Resolution, for it bears directly upon the value of the commodity and what the traffic will bear, which, as we have shown, has always been regarded as a legitimate subject of inquiry. Under the Resolution consideration of the economic condition of the industry was necessary to ascertain whether the facts brought the case within the application of the third paragraph of the Resolution." (p. 53)

"Taking the Commission's report as a whole, we submit that it is clear that the Commission did not base its action solely on the depressed condition of the industry. That was only one of the matters considered along with a great many others. It was not error to give consideration to the economic or industrial conditions, along with the other evidence. . . ." (p. 54)

"Indeed the evidence before the Commission in this case would, it is believed, have amply sustained a reduction of rates under Section 1 of the Interstate Commerce Act, even apart from the Hoch-Smith Resolution." (p. 86)

We are unable to determine from these statements whether or not Appellees contend that the Resolution did create any "additional test" or "add anything to the preexisting law with respect to the determination of a reasonable rate." If the Commission, under the Resolution gave only the same consideration to economic conditions that it was authorized (and we add required) to give under the pre-existing law wherein did it add any additional test? If it exercised only its long recognized power to consider the value of the service "along with a great many other" factors, why were the new rates prescribed as the "lowest possible lawful rates" and not as "just and reasonable rates"? What is new in such consideration, and why was it necessary that a special showing be made in order "to ascertain whether the facts brought the case within the application of the third paragraph of the Resolution"? If the Resolution did prescribe an additional test of reasonableness, upon what considerations was it to be applied? If confined to a consideration of the value of the service among other factors wherein was it new? If new or additional weight was to be given that evidence, what other factors were to be disregarded or given less weight, and where is the authority for ignoring or minimizing the effect of such other evidence? Is the new test to be applied in all cases or confined to certain cases, and if so confined what sort of depression would bring the case within the application of the Resolution? Is a depression, accompanied by an increased unit price of an agricultural commodity, within the Resolution or not?

We find no answer to these questions in Appellees' present Brief. We submit that they must be answered in order to determine the proper interpretation of the

Resolution, upon which the order of the Commission is now admitted to be based. As we interpret their arguments, the effort of Appellees is now to make it appear that while the order was based on the Resolution, the Resolution did not authorize any order that was not previously authorized, nor warrant the consideration of any matters not previously proper for consideration, and therefore the "new test" of the Resolution created no new standard. In effect this is to again contend that the order is based on section 1 of the Interstate Commerce Act. The Appellees make no effort to uphold the validity of the order, or the Resolution, assuming that the Commission did anything under the Resolution which would not have been done under the Act.

THE QUESTION

In view of the position now taken by Appellees, there is but one question to be determined in so far as the Hoch Smith Resolution is concerned. That question is,

Was the order merely the fixing of a reasonable rate, giving the due consideration to the value of the service that has always been recognized, or

Was the order made, pursuant to a supposed mandate in the Resolution, to fix the lowest possible lawful rate compatible with the maintenance of adequate transportation service on an agricultural commodity suffering from depression, merely because of such depression, regardless of its cause and irrespective of the extent to which it was reflected in transportation conditions?

Of course the issue of confiscation always remains, regardless of the basis of the order.

The answer to the question just suggested is to be found in the Commissions' reports in this case.

WHAT THE COMMISSION ACTUALLY DID

The original Report of the Commission refers to the Resolution as "primarily relied upon in the instant case" (R. 18).

It refers to the prices received for deciduous fruits as presenting "a fairly accurate index of the relative *prosperity of the industry*" (R. 23).

After mentioning defendants contention that the depression was due not to improper rates, but to overproduction, lack of proper marketing practices and the extensive use of land unsuitable to the production of the commodities, the Report says:

> "While undoubtedly overproduction and distributing practices are factors in the situation, *the essential fact* still remains that the *industry* is in serious financial straits" (R. 25).

and then points to increasing mortgages, tax delinquencies, reduced *net income* as being the evidences of such depression.

Having found as the essential fact, that the industry is unprosperous, the Resolution is considered and interpreted. The Commission concludes that under the Resolution the rates "on agricultural traffic as to which *depression* has been shown *must* be somewhere within the zone of reasonableness permitted by the flexible limits of discretion reposed in us, and that such rates *must* be put as near the lowest limit or level of that zone as is compatible with the maintenance of adequate transportation service" (R. 28). This interpretation

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All italics used herein are ours.

fixed the measure to be applied in the determination of the case. That measure was not that the depression must be considered to the extent that it was reflected in transportation costs or value of service, but that the depression, of itself, forced the prescription of a rate at the very bottom of the zone of reasonableness (*i. e.*, just above the point of confiscation) so far as consistent with the maintenance of adequate transportation service.

Previous decisions of the Commission holding rates on apples from the Northwest to Eastern points not unreasonable were relied on by the carriers. The Commission found these cases to be inapplicable, saying:

> "Defendants refer particularly to the $1.875 rate on deciduous fruits from Washington and Oregon to points in groups A to E, found not unreasonable in the case last cited. Complainants' evidence in that case related principally to economic and trade conditions affecting the marketing of western apples in territory east of the Missouri River, as to which a $1.50 rate was under attach. Moreover, the case was decided prior to the passage of the Hoch-Smith resolution * * *. They would not necessarily constitute precedents against the granting of relief if the same rates were assailed with an adequate showing of changed and different conditions of fact, or in the basic law applicable * * *" (R. 41).

Again, in referring to the rate on oranges which it found to be "at least not too high" (R. 42), the Commission said:

> "Under the Hoch-Smith resolution the relative prosperity of an industry over a period of years

may be considered as well as its relative adversity" (R. 42).

Having considered rate comparisons and operating conditions on defendants' lines the Report then considers the effect of a reduction on the industry and finds that "Assuming that the reduced rate would not be reflected in reduced selling prices, the reduction here sought, * * * would afford substantial relief to the growers, who bear probably the major portion of charges directly or indirectly, and would mean the difference between a loss and a small profit to many of them" (R. 49).

After stating this evidence the Commission proceeds to sum up the effect thereof and to announce its conclusions. We invite a consideration of this summary and conclusion (R. 56-59). When read solely with a view to determining what the Commission did, rather than what it might have done or could have done, we submit that it proves conclusively that the Commission acted not to fix a reasonable rate considering the cost of service, the bulk, value and other transportation matters, but solely because the industry was in a state of depression, the producers were not making a profit and therefore, as the Commission saw its duty under the Resolution, the rates formerly in effect, whether within the zone of reasonableness or not, must be reduced to the lowest possible basis. The finding of ultimate facts and the definition of the primary issue was stated as follows:

> "Complainant has established that the growing of deciduous fruits is one of the great basic industries of California, and that this industry for the past five years has undergone a period of de-

flation and depression. Its economic situation is such that it clearly comes within the terms of the Hoch-Smith resolution as entitled to the lowest possible lawful rates compatible with the maintenance of adequate transportation service. While all the defendants who handle the bulk of the deciduous fruit traffic have not as yet made the fair return, their present financial condition is relatively strong. It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service. The primary issue to be determined, therefore, is whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us" (R. 56).

If the Commission was interested only in the value of the service, as now contended in support of its order,

Why did it first refer to the basic character of the deciduous fruit *industry* and the depression therein (R. 56) instead of finding that the products of that industry were of relatively low value?

Why did it next say that the economic condition of that industry "is such that it clearly comes within the terms of the Hoch-Smith Resolution as entitled to the lowest possible lawful rates compatible with the maintenance of adequate transportation service" (p. 56) instead of finding that by reason of the low value of the products the existing rates were unjust and unreasonable?

Why did it then find that "while all the defendants who handle the bulk of the deciduous fruit traffic have not as yet made the fair return, their present financial condition is relatively strong" (R. 56) since if the old rates were too high in view of the cost and value of the service it was wholly immaterial whether the carriers were relatively

strong or weak, or indeed if they were actually or relatively insolvent?

Why did it proceed to state that "It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service" (R. 56) since if it was considering only the value of the service, as it had a right and duty to do under section 1, the effect on adequate transportation service could be no ground for failing to reduce an unjust or unreasonable rate?

Why did it consider, in the light of these findings, that "the primary issue to be determined, therefore, is whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us" (R. 56-57) rather than define the issue as being whether considering the cost and value of the service and the relation of this to other rates it was unjust or unreasonable?

Why did it name as the first important difference between the record in this case and that in the prior proceeding involving the same rates. "The Hoch-Smith resolution was approved subsequent to the presentation of the prior case" (R. 57) if the Resolution merely directed them to exercise the same power to consider industrial conditions that they previously possessed?

Why did it state as the second important distinction from the earlier case that "The depression * * * has continued unabated * * * and conditions in 1926 were worse than in 1923 * * *" (R. 57) if all it was considering was the value of the commodity and not the profitableness of the industry?

Why was the third difference stated to be "The present economic showing is fully responsive to the terms of the resolution * * *" (R. 57) whereas in the former case not shown over a reasonable period of years, if it was not thought that under the Resolution something different was required

than was pertinent under the Act on the question of value of the commodity and value of service?

Why is a further improvement in the financial condition of the carriers referred to as a distinguishing factor, a fact that would be wholly immaterial if all that was being done was the fixing of a reasonable rate in the light of long-established standards?

Why did it preserve the new rates not as "just and reasonable" but as "the lowest possible lawful rates, etc." if it then thought, as is now contended in support of the order, that the Resolution merely stated "an additional test in accordance with which it should exercise its discretion in determining whether an existing rate on agricultural products should be reduced" and that "it was warranted in finding that any rate which did not accord with that test was unreasonable"? (Brief, p. 33).

Why was it argued in support of the order at the previous hearing in this Court that " * * * the finding of the Commission, that the challenged rates were 'unreasonable', was a finding of unreasonableness under section 1 of the Interstate Commerce Act and not a finding of unreasonableness under a new or different standard" (Brief of Appellees, on original hearing, p. 43) a contention which is now abandoned? If the Appellees are unable to state the basis for the order and offer such inconsistent arguments in support thereof is it not fair to assume that it was wholly without a legal basis, hence representing a mere arbitrary fiat rather than the enlightened and reserved judgment of a "tribunal constituted by law and informed by experience"?

The concurring opinion of Commissioner Eastman shows that the order was based on a supposed new and different standard and not on a mere application of the old rule of value of the service. He says that

"it is by no means clear that the rates in issue are unreasonable and ought to be reduced" but that "complainant is entitled under the Hoch-Smith resolution to the benefit of the doubt" (R., 59). Who will contend that giving the benefit of the doubt to the shippers when it does not appear that the rates are unreasonable is nothing but giving the same weight to the value of the service that the Commission was always authorized, though not required to give? Commissioner Eastman finds that "so far as juice grapes are concerned the California growers apparently dominate the market, and are suffering chiefly from overproduction and competition among themselves" (R., 60). Does this observation fit with the contentions now advanced that the Commission considered only the value of the service and not merely and solely the commercial conditions in the industry?

Commissioner Woodlock in a concurring opinion (joined in by Commissioner Taylor), pointed out that the resolution requires the maintenance of adequate transportation service and said: "If these words mean anything they mean that, broadly speaking, we must shift some of the burden now borne by agricultural products suffering from depression to other classes of traffic, meanwhile maintaining carrier revenues reasonably intact failing evidence that these revenues are excessive" (R., 60). Does this sound as if nothing were being done but fixing reasonable rates in light of the value of the service? He proceeds "The *new standard* of measurement for rates on agricultural products implies *new standards* for rates on other commodities" (R., 60-61). How is this to be reconciled with the Appellees theory that the Resolution merely made mandatory what was previously discre-

tionary, and that the Commission considered only the value of the service just as it had been authorized to do, and doing, for years. This same concurring opinion later says, "The Hoch-Smith resolution is addressed to this Commission, *and not to the carriers.* It is we who must readjust the rate structures according to the terms of that resolution, and we can not shift the burden to the carrier executives" (R., 61). If the Resolution is not addressed to the carriers, and we agree with the Commissioners that it is not, how can the rates be found unlawful because not in conformity therewith? Where is the authority of the Commission to alter the rates fixed by the carrier in the exercise of their discretion in the absence of a finding of unlawfulness? We submit that it is not contained in the Art, which permits the Commission to change the carriers rates only when found to be unlawful and this Court has held that this is a jurisdictional question. (Interstate Commerce Commission vs. Louisville and Nashville R. Co., 227 U. S. 88, 92.) It is not found in the Resolution which authorizes only "lawful changes" to accomplish the objects therein set forth.

We submit that the Commission in this case did not act as it is now contended that it did. It did not consider the depression in the deciduous fruit industry only in so far as reflected in a lessened value of the service, but treated that depression as being the essential factor, regardless of its cause and regardless of the extent to which it reflected in transportation conditions. It treated the Resolution as making mandatory a reduction in rates below what would otherwise be reasonable whenever a depression exists. It did not consider the depression in the deciduous fruit industry from the standpoint of the value of the serv-

ice but as being something wholly apart from transportation and the mere fact of depression in the industry was the actuating force leading to the order in question.

THE COMMISSION HAS CONSISTENTLY CONSTRUED THE RESOLUTION AS REQUIRING IT TO FIX LESS THAN REASONABLE RATES.

Appellees say that the interpretation of the Resolution by the Commission has been clear and consistent. They also say that the Commission under the Resolution has done nothing more than fix rates in view of the value of the service, something it has always been authorized to do. We have shown that in this case the Commission acted with a wholly different conception of its power and duty under the Resolution and fixed the new rates, not as reasonable rates in the light of all pertinent transportation conditions, but as something less than reasonable rates thought to be required by the Resolution merely because the producers were not prosperous and regardless of the causes of that depression or the extent to which reflected in transportation.

This construction and application of the Resolution by the Commission was not due to some inadvertent language in this case but is a part of the clear and consistent policy of the Commission.

In Muller & Co. v. Pere Marquette R. Co., 151 I. C. C. 787, 793, the chicory producers in Michigan were found to be suffering from depression due to increased costs of production and foreign and domestic competition. The Commission said:

"Considering all the evidence of record, it can not fairly be said that the rate assailed is higher than a reasonable maximum rate * * * We therefore find from the evidence that the assailed rate was and is not in excess of a reasonable maximum rate, but that for the future the rate assailed will be unreasonable and in excess of the lowest possible lawful rate compatible with the maintenance of adequate transportation service * * *"

In the light of this finding we submit the Commission does not give the Resolution the interpretation and affect ascribed to it nor does it act in the manner stated by Appellees in their brief.

Again in South Carolina Produce Ass'n. vs. A. & R. R. Co., 152 I. C. C. 5, 27, the Commission clearly indicated that its interpretation of and action under the Resolution is as claimed by us and not as contended by Appellees. It distinguished between the exercise of its ordinary rate fixing power and its idea of the Resolutions as follows:

"Moreover, in view of the fact that the rates which we propose to prescribe will be, in our judgment, the lowest possible lawful rates which may properly be prescribed, under the evidence in this case, such a standard, prescribed for the future, can not be accepted as a standard of reasonable rates in the past. *That resolution directs us to take into consideration the economic necessities of a shipper when fixing a rate structure. Rates made in contemplation of that resolution are less than maximum reasonable rates.* This inevitably follows from the provision of the law. A certain zone of reasonableness is created within the limits of which any rate so falling must be considered reasonable. We can prescribe such a basis for the future; but if we have settled upon the measure of

such a rate taking into consideration the provisions of the resolution, *it is clear that a rate arrived at upon such considerations is not a maximum reasonable one.* If such be true, it is unsound automatically to take a rate found reasonable for the future in the light of the Hoch-Smith Resolution and prescribe it in the past as a basis for reparation, because to do so would be to award damages down to the basis of a rate which admittedly is lower than a reasonable maximum."

In the light of this interpretation of the Resolution by the Commission how can Appellees contend that

> "* * * the Commission properly construed the third paragraph of the Resolution as entering into the prescribed legislative standard for the determination of the reasonableness of rates on agricultural products suffering from depression and as meaning that a rate above the lowest possible lawful rate compatible with the maintenance of adequate transportation facilities must be deemed an unreasonable rate with respect to such commodities" (Brief on Reargument, p. 36).

The actual views of the Commission as manifested in this case and in the later cases to which we have referred are well epitomized in a public address made by Commissioner Meyer, as quoted in The Hoch-Smith Resolution, by Warren H. Wagner, p. 35:

> "Commercial considerations of this character (such as values, risk, competitive articles, etc.) had always been taken into view by the Commission. However, when we were asked to establish rates on the ground that they would permit the applicant to increase his output, to extend his territory, *to increase his profits,* to strengthen his competition, to fortify his location, and similar matters,

generally speaking, we said in one form or another that these were commercial conditions which we were not permitted to give weight in establishing just and reasonable rates under the law. We said that the law restricted us to transportation conditions. Such was our unbroken line of decisions.

"The Hoch-Smith Resolution changed all this. It not only authorizes but it directs us to take into consideration commercial conditions. This in a word is what may be termed the revolutionary effect of that piece of legislation."

The consistent view of the Commission has been that the Resolution requires it to fix rates at the lowest possible level, defined by it to be a point just escaping confiscation (compatible with the maintenance of adequate transportation service) whenever an industry is shown to be suffering from depression, regardless of the cause of that depression and whether or not reflected in transportation. This is not an exercise of any power previously possessed, as often held by this Court. It is not warranted by the terms of the Resolution which refer only to lawful changes and to the consideration of industrial conditions only "in so far as legally possible." It is a misconception of the law applicable, and the decision being admittedly based on the construction it gave the Resolution, the mistake of law renders the order void, regardless of what it might have done under the evidence had it properly applied the law.

Action under the Resolution does not involve an exercise of the Commission's discretionary power to fix reasonable rates.

The Resolution cannot be explained by saying that it called for the exercise of the Commission's discre-

tion in a particular manner, and that it was within the power of Congress to itself prescribe rates, or direct that certain rates be prescribed. When definite action is directed and required, discretion vanishes. The action of the Commission then becomes mandatory and the only inquiry left is under what such circumstances shall the action be taken. It is self-contradictory to then say that the mandatory consideration of the specified condition is but one of several factors entering into the final result. If the factor of depression is to be weighed against other factors it is again a matter of judgment and not mandatory. It then becomes the same test that has always been applied. There is no half-way point. The Resolution either changed the law, in which event depression, regardless of its cause and irrespective of its effect on or reflection in transportation conditions, becomes the sole test and the process of reduction automatic, or it made no change in the law and the Commission must determine what rate is just and reasonable "exactly as in any other case arising out of the Interstate Commerce Act." The former is the interpretation given the Resolution by the Commission when it made the order here involved, and consistently followed since that time. The latter is, we submit, the correct interpretation, and is in effect the only view supported by Appellees in their Brief; but it is not the view which the Commission followed in this case.

What we are concerned with here, is not what the Commission might have done, but what it has done, not what theory can be suggested which would have supported the order, if the Commission had followed that theory, but what theory the Commission did follow.

The action taken under the Resolution is not a lawful exercise of discretion within a "zone of reasonableness"

When the Commission defines the zone of reasonableness as extending from the point of confiscation as a minimum to the point of extortion to the shipper as a maximum, "within which any rate is just and reasonable to the carrier as well as just, fair and reasonable to the shipper" (R., 27-28) it limits its own authority to the fixing of the highest rate within that zone as the maximum that may be charged. While it must exercise judgment in finding that maximum when that judgment is exercised in a legal way, the carrier under the law is entitled to charge that rate and the Commission is without authority under the Act to require it to accept less, even though the lesser charge, as in Southern Pacific Co. vs. Interstate Commerce Commission, 219 U. S. 433, be above the point of confiscation, and therefore within the zone.

It is a contradiction in terms to argue as do Appellees here that there is more than one lawful rate. When the Commission prescribed the rate here under attach as the "lowest possible lawful rate" they by that very term recognized that a higher rate was also a lawful rate. What therefore prevents the carrier from charging that higher lawful rate, since by definition it cannot be a lawful rate unless it is reasonable? The order of the Commission prevents the carriers from charging any more than the lowest rate and therefore the higher rate is unlawful. But the very fact that the new rate is prescribed as the lowest possible lawful rate imports that but for the Resolution a higher rate would have been found reasonable under

the Act, upon consideration of the same economic conditions so far as reflected in the value of the service. What therefore compels the fixing of the lower rate? Obviously it is not transportation conditions. Under the Act it is the duty as well as the right of the Commission to fix rates in the light of the value of the service so long as compensatory rates are provided as a minimum. The fixing of a lowest possible lawful rate necessarily implies that the rate fixed is less than the one which would be fixed on such consideration. The criterion which compels the fixing of the lowest possible rate is the depression or adversity of the industry regardless of its cause and wholly apart from the extent to which it is reflected in transportation. Such was the action taken here and it is just as much an avoidance of the issue to contend now that commercial conditions were considered only in so far as they were reflected in the value of the service, as it was an avoidance of the issue at the previous argument to contend that the order entered in this case was made simply because the rates were found unreasonable under section 1.

The third paragraph of the Resolution adds no substantive provision to the law.

Appellees arguments are predicated wholly upon the third paragraph of the Resolution, as if it were a separate enactment. They contend that our interpretation of the Resolution would render that paragraph meaningless and that by emphasizing the requirements that the changes be "lawful changes" and the rates "lawful rates," i. e., lawful under the pre-existing law, we render ineffective the reference to "lowest

possible" rates. We deny that the third paragraph added any substantive provision to the Resolution. The entire Resolution made no substantive change in the law. It was directory only, and addressed to the Commission only. If any substantive change were contemplated it would have to be directed to the carriers, who publish rates in the first instance. This was not done, and the Commission, in the concurring opinion of Commissioners Wooklock and Taylor, recognized this fact (R. 60). The only effect of the third paragraph was to direct immediate attention to the *existing* depression in agriculture and direct that lawful rates be fixed *with the least practicable delay* on products affected by *that* depression. It did not refer to any future depression or products that might be affected thereby. It was on its face a temporary expedient, not intended to enunciate a principle of substantive law for general application through future years. It cannot be construed as stating any new or additional principle of regulation.

Appellees contend that the third paragraph of the Resolution entered into a 'legislative standard for the determination of the unreasonableness of rates on agricultural commodities suffering from depression and as meaning that a rate above the lowest possible lawful rate compatible with the maintenance of adequate transportation facilities must be deemed an unreasonable rate with respect to such commodities." The proviso requires that pending cases be decided "in accordance with this Resolution." The pending cases in many instances sought reparations for unreasonable charges alleged to have been collected by the carriers on shipments made as long as two years before the filing of complaints. If Appellees are correct in saying that the third paragraph of the Resolution is a legis-

lative declaration of unreasonableness the Commission's duty under sections 1 and 15 of the Act would have been to award reparation down to the basis of the lowest possible lawful rates in all such cases. It is obvious that the suggested interpretation is incorrect.

The Commission itself has refused to carry this theory to its logical conclusion and has held that rates not conforming to its conception of the requirements of the Resolution are not by that fact in violation of section 1 of the Act. South Carolina Produce Assn. v. A. & R. R. Co., 152 I. C. C. 5, 27.

The Resolution can be interpreted consistent with recognized canons of statutory construction only as a whole. It can be so interpreted only as an admonition to the Commission to apply the then existing law and not as declaring new principles of law. So construed it is unobjectionable and subject to no constitutional doubts. No part of the Resolution is nullified by such construction. The third paragraph is given full effect as pointing out a particular industry whose rates, it was thought, violated existing law and saying that since that industry was in hard straits, immediate attention should be given to its rates and where found in violation of the law reduced as quickly as possible. It is thus a specific application of the general rule, to which, in view of an existing emergency, immediate attention is directed. The proviso imports nothing more than a direction to dispose of pending case in accordance with the existing, and unaltered law, and its purpose is merely to avoid any thought that they should be held up until the general investigation of all freight rates should be completed, obviously a task requiring years of effort.

ARE THE RATES CONFISCATORY?

Our contentions are founded on the Conrad cost-study and are discussed in our Brief on Rehearing (pp. 172-191). Appellees seek to reject this evidence as insufficient or unreliable although the Commission in making the order here complained of gave "due weight to the cost-study presented by defendants" (R., 58) and in the Report on Further Consideration said: "While consideration was given to the cost-study submitted by defendants, it was not the controlling factor in our discussion" (R., 68). If it was accepted for any purpose and given any consideration it could only be because it was thought to be adequate and reliable. Having been accepted and considered by the Commission it cannot now be rejected. It was the only evidence of costs before the Commission and was the only possible foundation for the finding that the new rates were the lowest possible lawful rates.

The class of evidence customary in cases arriving under Section 1 of the Act has been held by the Commission to afford "little basis" for the determination of rates under the Resolution, clearly indicating that something other than transportation conditions is considered by the Commission to be contemplated by the Resolution.

In *State of Colorado v. A. T. & S. F. Ry. Co.*, 147 I. C. C. 201, 212, the Commission says:

> "In their briefs and oral arguments complainants claim the benefits of the Hoch-Smith resolution as entitling them to the lowest lawful rates compatible with the maintenance of adequate transportation service. The records in these cases were not particularly presented so as to

> show the particular facts establishing a case for relief under that resolution, but were directed to the establishment of reasonable rates according to the usual standards, and to the curing of alleged undue prejudice to complainants and preference of their competitors. Therefore these records afford little basis for the prescription of the lowest possible lawful rates on this traffic."

Without the cost-study that essential finding is unsupported by evidence and void. If the cost-study was good evidence on that issue it is equally good evidence to show that the rates are confiscatory.

It is now criticised as being made up of estimates and arbitrary allocations of costs not solely attributable to the fruit traffic, except for $55.92 for wages and fuel out of $341.23. The items of wages and fuel were not the only directly allocated expenses as appears from the Commissions report (R., 54). They were the only items on which detailed information was requested by complainant. As to the allocations of other expenses the Commission said: "The methods employed in reaching the results seems to be satisfactory" (R., 54) and after pointing out the direct allocation of items such as wages, fuel, switching, repairs, etc., said that "Other items were reasonably apportioned to the grape trains" (R., 54). The Commission, the expert body to which Appellees attribute practical infallibility in other respects, found the methods satisfactory and the apportionment reasonable and gave due weight to the study in fixing the rates as the lowest possible lawful rates.

It is now criticised as showing costs on only one railroad. Testimony by an expert of admitted repute that it was representative of the conditions on other lines

was uncontradicted. As the Santa Fe was the most prosperous of all the Western lines involved it is evident that this evidence was true. If it was not representative of conditions on the other lines upon what evidence did the Commission find that the new rates were the lowest possible lawful rates on those lines? This Court has recognized the propriety of taking evidence representative of conditions involving many rates and many carriers. (New England Divisions Case, 261 U. S. 184.)

A similar answer may be made to the contention that the study being confined to grapes is not available with respect of the other fruits involved. Grapes constitute the greater part of the traffic. They furnish the greatest carload revenue and load the heaviest. Appellees elsewhere contend that heavy loading commodities are relatively more profitable than those which load more lightly. If so, the relative costs on the other fruits are greater, the revenues therefrom much less and the loss thereon even greater than we contend.

The cost study is criticised as being applied to the weighted average haul, 2,970 miles, although made only on the Santa Fe, for a haul of 2,331 miles to Chicago. The Commission itself thought this was proper and made such a projection. It attempted to correct the factor of empty haul (a correction later admitted to have been in error) and ascertained the average cost per car mile west of Chicago. It then went on, "Applying this cost per car mile to the average weighted haul in 1926, 2,970 miles, gives an indicated cost of $414.02 per car" (R. 55). This was later corrected to $433.68 (R. 67). We can hardly be criticised for relying on a method followed by the Commission and given due weight when it made the order.

Appellees also say the cost-study is objectionable because made in September, 1923, and not covering an extended period of time, and because used at a hearing in 1927. It was contended throughout this proceeding that costs are lowest during the peak period, which occurs in September and October. The representative character of the period chosen for study appears from complainants own showing. Uncontradicted testimony was offered to show the applicability of the 1923 study to 1926 conditions (R. 480-1). The record was made in the case on 1926 conditions, the hearing having been in March, 1927.

In the Report of the Commission on Further Consideration (R. 67-68), other "possible defects" or "questionable" items are referred to. None of these are stated to be real, as distinguished from "possible" objections. Similar doubts were suggested as to these same questions as well as other possible questions in the briefs filed herein at the previous hearing and at the oral argument. As these questions are not repeated, we assume that they have been abandoned. But if still urged we wish to point out that all are based on speculation and conjecture. The size of the exhibit, its time of presentation or the detail which accompanied it are immaterial. It was presented by an experienced accountant, familiar with the problem through long experience. He was subjected to cross-examination and all detailed information desired by the parties was supplied (R. 489). The cost study was accepted by the Commission as being made up by proper methods and allocations (R. 54). It was given due weight in fixing the new rates. If it was suitable for that purpose we may use it to show that the Commission made a rate which fails to return the cost of the service.

The Commission in its original Report fixed the new rate as being the lowest possible lawful rate required by the Resolution. It did this after giving due consideration to the cost study, which it then thought indicated a cost of $414.02 per car, without taxes or rentals of equipment or joint facilities. The lowest possible lawful rate must return all costs, including taxes and a substantial profit, compatible with the maintenance of adequate transportation service. This is admitted by Appellees. As the average revenue under the old rates was but $489.59 it is obvious that after allowance for taxes and rentals the Commission had little or no margin of profit in mind when it ordered a reduction in the rates. We contend that the average revenue under the new rates will be but $467.07 per car. The highest Appellees suggest is $480 per car.

But in finding $414.02 per car as the cost of service the Commission made an error in its calculations. It later admitted the error and found the cost to be $433.68 (R. 67), still without taxes or rentals. We have computed taxes as amounting to $36.38 per car and the cost therefore $470.06, exclusive of rentals. The manner of calculating taxes is explained in our Brief on Rehearing (p. 178) and is not questioned by Appellees. But having admitted an error of approximately $20 per car in its calculations the Commission still adhered to its original order. It still gave "due consideration" to the cost study. It was still attempting to fix the lowest possible lawful rate. The substantial return to which the carriers are entitled under the Constitution had not changed. The amount necessary, over costs, to maintain adequate transportation service had become no less. But the cost of service, whether shown precisely or only approximately was

nearly $20 greater than it was thought to be when the order was made. As the Commission was attempting to fulfill the task of fixing the lowest possible lawful rate and as the starting point for that determination was the cost of service it is obvious that the same rate could not be the lowest possible lawful rate regardless of a difference of $20 per car in the cost of the service. The confiscatory character of the rate is patent from the Commission's own decision and no period of experimentation is necessary or proper before an attack is made on the order prescribing them.

CONCLUSION

The position taken by Appellees in support of the order, permits a definite limitation of the issues herein. By failure to controvert we assume they admit the correctness of these propositions advanced by us,

Under the Interstate Commerce Act the Commission could lawfully consider industrial conditions only to the extent that they were directly reflected in transportation.

The Hoch-Smith Resolution was designed to correct existing illegalities and was not intended to nor did it purport to establish any new principles of rate regulation.

Not even the legislature may require the carriers to transport freight for less than a reasonable rate, nor may the power of classification of commodities be exercised on grounds of public policy alone, but it is confined to a classification based on transportation conditions alone.

Mere prosperity or adversity of a shipper or an industry does not constitute a legitimate basis of classi-

fication, nor may it influence the fixing of rates in any way except as directly reflected in the value of the commodity or the value of the service.

Regardless of the value of the service in no case can rates be fixed which yield less than the cost of service, and in addition a sufficiently substantial profit to contribute fairly, in view of the transportation characteristics of the commodity, toward the fair return required by law.

Congress itself has no power to regulate industrial conditions, but has power only to regulate commerce, and this is the only power that can be delegated to the Commission.

If we have correctly interpreted Appellees position it is in substantial accord with the principles of law which we contend should be applied, as set out fully in our Brief. The only issue is whether the Commission acted as we contend it did. Appellees say that it undertook only to give consideration to industrial conditions as reflected in the value of the service, and along with many other matters pertinent in determining the reasonableness of rates. They say the Commission correctly interpreted the Resolution as directing and authorizing no more than this. While admitting that the Resolution was the basis for the order complained of, they construe it as if nothing were added to the law (as we contend is the proper interpretation). They make no effort to uphold any broader interpretation, nor do they attempt to support any different action by the Commission under its authority than would have been proper without the Resolution.

We contend that in this case, consistent with a policy pursued in all its recent decisions, the Commission has acted, in purported compliance with the Resolu-

tions, as if it directed a reduction in rates to the lowest possible lawful level consistent with the maintenance of adequate transportation service, wherever a depression was shown to exist in an agricultural commodity, without inquiry or regard to the cause of such depression or its effect on transportation conditions. In so doing we say it has made depression the sole test, and the process of reduction automatic. This, we claim, is not in accord with the requirements of the Resolution, and if it were it would be subject to serious doubt as to its constitutionality because not a reasonable regulation of the carriers, and because it would be a regulation of industry, not a regulation of commerce.

We submit that an examination of the reports of the Commission in this case will disclose that it acted precisely as we charge. If it so acted, its order is void because not authorized by either the Interstate Commerce Act or the Resolution and no effort has been made to justify the action which was in fact taken by the Commission, as shown by its reports herein.

Whether the governing law was correctly interpreted and applied or not the actual rates prescribed are shown by the record herein to return less than the cost of the service, and therefore deprive the carriers of the substantial profit to which they are constitutionally entitled.

We submit that the order of the Commission is void and the decree of the lower court dismissing the bill filed to enjoin its enforcement should be reversed.

Washington, October 19, 1929.

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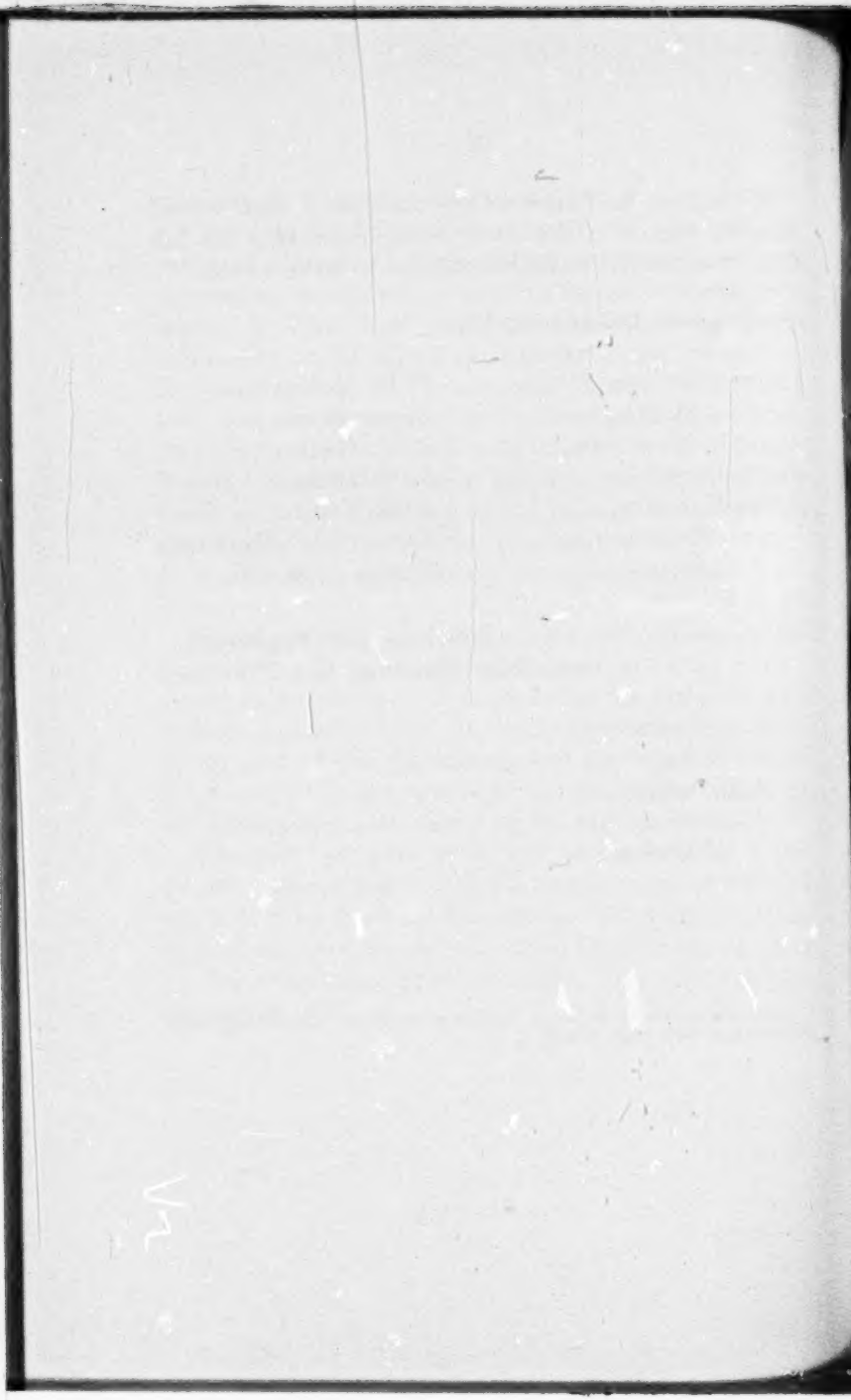
NOTE: Reference to pages of Appellees' Brief are approximate only, being taken from page proofs.



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